United States Court of Appeals

for the Second Circuit

PETITIONER'S BRIEF

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

JAMES K. STERRITT, INC., AND CONCRETE HAULERS, INC.,	:
Petitioner,	:
v.	:
NATIONAL LABOR RELATIONS BOARD	:
Respondent.	:

PETITIONER'S BRIEF IN SUPPORT OF ITS PETITION FOR REVIEW AND IN OPPOSITION TO THE CROSS-APPLICATION FOR ENFORCEMENT OF THE NLRB'S ORDER

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TABLE OF CONTENTS

PRELIMINARY STATEMENT

Petitioner seeks review and Respondent NLRB makes a cross-application for enforcement of the December 16, 1974 Decision and Order of the National Labor Relations Board made by a three-member panel composed of Chairman Edward B. Miller and members Howard Jenkins, Jr. and Ralph E. Kennedy and reported at 215 N.L.R.B. No. 143.

Throughout this Brief, Petitioner James K. Sterritt, Inc. and Concrete Haulers, Inc. is referred to as "Employer" unless a more specific designation is required in context. The National Labor Relations Act is referred to as "the Act." Teamster Local Union No. 294 is referred to as such or as "the Union."

The contents of the Joint Appendix have been agreed to by the parties. Joint Appendix-Vol. II is the complete transcript of the hearing before the NLRB Administrative Law Judge. Joint Appendix-Vol. III contains exhibits introduced at that hearing. Pages of the Joint Appendix are cited as (JA I., p.),(JA II., p.) etc

TABLE OF AUTHORITIES CITED

Throughout this Brief, references are made to Section 8(a), subsections (1), (3) and (5) of the Act. As they relate to this case, those subsections are as follows:

> Sec.8(a) It shall be an unfair labor practice for an employer -
>
> (1) to interfere with, restrain, or coerce employees employees in the exercise of the rights guaranteed in section 7;
>
> . . . .
>
> (3) by discrimination in regard to hire or tenure of employment to encourage or discourage membership in any labor organization . . .;
>
> . . . .
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of 9(a).

At page 20, infra, reference is made to the "instrumentalities, links and channels of interstate commerce" jurisdictional yardstick of the NLRB. That yardstick is as follows:

> Jurisdiction will be asserted if -
>
> (1) $50,000 yearly revenue is derived from the interstate (or linkage) part of the enterprise, or
>
> (2) $50,000 yearly revenue is derived from services performed for employers meeting any of the jurisdictional yardsticks, except the $50,000 indirect outflow and indirect inflow for non-retail businesses.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

I.

Whether there is substantial evidence on the record considered as a whole to support the jurisdictional allegations in the complaint issued by the General Counsel of The National Labor Relations Board in these proceedings.

II.

Whether there is substantial evidence on the record considered as a whole to support the finding that the Employer's statements to employee Robert Quick violated Section 8(a)(1) of the Act as alleged in paragraphs VI and X of the complaint and constitute an interference with its employees in the exercise of their rights under Section 7 of the Act.

III.

Whether there is substantial evidence on the record considered as a whole to support the findings that the employer failed and refused to recall its employees who are the charging parties in these proceedings, that such failure and refusal was based on the employees' having joined or assisted Teamsters Local Union No. 294 or engaged in other union activities or concerted activities for the purpose of collective bargaining or their mutual aid and protection as alleged in paragraphs IX and XI of the complaint.

IV.

Whether there is substantial evidence on the record considered as a whole to support the finding that the employer's activities in September 1973 and January 1974 in dealing directly with its employees constitute encouragement of such employees to by-pass Teamster Local Union No. 294 or to deal directly with employees so as to constitute an unfair labor practice under Section 8(a)(1) of the Act.

STATEMENT OF THE CASE

I. Nature of the Case, Course of Proceedings and Disposition Below

On February 20 and 24, 1974 separate but substantially identical charges were filed with the NLRB charging that James K. Sterritt, Inc. had engaged in and was engaging in unfair labor practices within the meaning of Section 8(a), subsections (1) and (3), of the Act by terminating the employment of the seven charging parties because of membership and activities in behalf of Teamster Local Union No. 294 and in that, since such termination, "it has refused and does not refuse to employ" each such employee (JA I., pp.3 and 4). On April 23 and 24, 1974, a substantially identical amended charge was filed in each case which amends each original charge by including James K. Sterritt, Inc. and Concrete Haulers, Inc. as the Employer and by amending the wording of the charge to allege that the Employer "has refused and failed to recall and reinstate" each such employee (JA I., pp. 3 and 5).

On April 30, 1974, the NLRB's Third Regional Director issued an "Order Consolidating Cases, Complaint and Notice of Hearing" (JA I., p.6) which the Employer answered on May 10, 1974 (JA I., p.14). On May 28, 1974 the NLRB gave "Notice of Intention to Amend Consolidated Complaint" (JA I., p.17). The

Complaint follows the allegations of the Amended Charge and adds allegations that the Employer threatened its employees (JA I., p.11, para VI). The amendment adds allegations that the Employer engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act by bargaining directly with its employees, and urging them to by-pass the Union and establish their own union.

On June 4, 5, 6 and 11, 1974 a hearing on the Consolidated Complaint was had before NLRB Administrative Law Judge Paul Weil in Albany, New York. The entire transcript of that hearing is before the Court as Joint Appendix-Volume II. The NLRB motion to amend the Complaint was granted by the Administrative Law Judge over the objection of the Employer (JA II., pp. 5-8).

The NLRB made no ruling on the Employer's Motion to Correct the Official Report of Proceedings (JA I., p. 19). That failure or refusal is not substantial. However, we submit that the reader of the transcript will avoid confusion by reading the terms "swinging a load" as "slinging a load."

In his August 12, 1974 Decision (JA I., p. 22), the Administrative Law Judge (JA I., p. 35, ll. 37 to 44) recommended that the complaint be dismissed insofar as it alleged the threatening of the charging party Overbaugh (one of the instances alleged

in paragraph VI of the Complaint (JA I., p.11)). Although no specific recommendation is included in this decision, there is no finding that the lay-offs of the charging parties were unfair labor practices as alleged in paragraphs VII, X and XI of the Complaint (JA I., pp. 11 and 12). In his "Conclusions of Law" (JA I., p.37) the Administrative Law Judge finds an unfair labor practice within the meaning of section 8(a)(3) in the Employer's "failing and refusing to call back after a layoff [the charging parties]. The layoff or "termination" is not found to be an unfair labor practice. Except as noted above, the Decision of the Administrative Law Judge concludes that the Employer is guilty of the unfair labor practices alleged in the Complaint.

On September 9, 1974, the Employer filed exceptions to the Decision of the Administrative Law Judge (JA I., p.42).

On December 16, 1974 the NLRB issued its Decision and Order affirming the fulings, findings and conclusions of the Administrative Law Judge (JA I., p.54). On January 28, 1975 the NLRB issued an "Order Correcting" which substitutes the term "Respondent" for "Respondents" and reflects the finding that James K. Sterritt, Inc. and Concrete Haulers, Inc. are one employer for the purposes of this proceeding.

The Employer petitions for review of the NLRB Decision and Order (Docket No. 75-4011) and the NLRB has made a cross-application for enforcement of its order (Docket No. 75-4044).

II. Statement of Facts

During the Winter of 1973-74, James K. Sterritt conceived and put into operation a unilateral course of conduct which, without denial or doubt, constituted a classic refusal to bargain, an unfair labor practice within the meaning of section 8(a)(5) of the Act. As the owner of James K. Sterritt, Inc. he had recognized Teamster Local Union No. 294 as the representative of its employees on May 13, 1973 (JA III., p.3). After negotiations with Local 294 he signed an agreement, gave wage increases and forwarded the agreement to the Union on about November 19, 1973 (JA II., p.615) but it was not signed by the Union (JA II., p.528-29). After lay-offs during the slow winter season, Sterritt formed Concrete Haulers, Inc. which, on about February 1, 1974 reinstituted the James K. Sterritt, Inc. operation with some of the same employees but paying lower rates and benefits than those put into effect in November 1973.

Under the six-month statute of limitations of section 10(b) of the Act, the Employer could have been charged with a section 8(a)(5) violation at anytime prior to August 1974. As indicated in the Docket Entries (JA I., p.3) the charges were filed in February 1974, the amended charges in April 1974 and the hearing was closed on June 11, 1974. No section 8(a)(5) charge was brought by any person and no charge was filed against Local 294 with respect to the facts and circumstances of these proceedings. We submit that these underlying facts and circumstances are extremely important in understanding the facts and the motivations of the persons and parties involved in these proceedings.

In May 1973, after a strike for recognition by the Union, the Employer signed a recognition agreement (JA III, p.3). Immediately, the Employer took the initiative in attempting to conclude an agreement in direct negotiations with the Union (JA II, pp.516-28). Prior to the recognition strike, about one-half of the Employer's employees were members of the Union (JA II., p.601) because of the need to have a Teamster "book"to deliver to"Union" construction sites (JA II., p. 267). In some cases the Employer financed such "membership" (JA II, p. 364-66).

On August 30, 1973, the Union's demand for retroactive pay to August 1st was discussed in a negotiating session but no agreement was reached (JA II, p. 525). At the next session on

Thursday, September 13, 1973, no agreement was reached but there was a discussion of proposals and alternatives which were to be submitted by the Union to its members (JA II., pp. 526-28). Among those were the Employer's proposals with respect to excessive waiting time and the slinging of loads by drivers. The proposals and alternatives were rejected by the employees at a meeting with Nicholas Robilotto, the Union President on Friday, September 14, 1973 (JA II., pp. 270-71).

It is undisputed that the work performed in this case by all employees involved was solely the transportation of products manufactured by Span-Crete Northeast, a subsidiary of Callanan Industries.

On Thursday or Friday (September 13 or 14), John Miller, the coordinator and shipper for Spancrete (JA II., p. 599) called Sterritt to advise that shipments on the following Monday and Tuesday were to "straight union jobs" and asked Sterritt how he was going to handle it (JA II., p. 600). Sterritt responded that he did not know (JA II., p. 600) and advised Miller to get someelse to handle the loads (JA II., p. 601). Sterritt was disturbed at having to pay an extra days pay for loads without union drivers, (JA II. pp. 598, 600-601) and because "The Union was being very sluggish in getting things iron out and resolved. . . ." (JA II., p. 601).

On Sunday, September 16, 1973, the President of Callanan Industries, Doc Marcelle, called Sterritt and said that ". . . Mr Robilotto was sitting there in his office and I was to get up there immediately." (JA II., p. 594). From that time until March 1974 the Union used various officials of Callanan Industries and Span-Crete to communicate with and make its position known to Sterritt: Marcelle (JA II, p. 594), Blosser (JAII, p. 596), Fisher (JA II., p. 602), Fitzgerald (JA II, p.605 and JA III., p.40) Blosser (JA II., pp. 607, 608, 615, 620-21) and Fitzgerald (JA II., p. 631). Based on that uncontradicted testimony the Employer took exception to the finding that ". . . Sterritt no longer took an active part in the negotiations which were handled by representatives of Span-Crete on his behalf." (JA I, p. 26, 11. 16-18 and page 45). We submit that there is absolutely no support in the record for that conclusion by the Judge.

At the meeting in Marcelle's office on Sunday, September 16, 1973, Robilotto expressed anger that another hauler was handling Span-Crete's shipments the next day (JA II., pp. 596-97) and the meeting ended shortly (JA II., p. 597). Shortly thereafter, Sterritt received another call from a Span-Crete official asking him to meet again with Marcelle (JA II., p. 602). Sterritt emphasized that Robilotto "had to do something immediately to

provide me with some sort of a passport . . . for the men that did not have books to get on and off jobs until we could get this thing resolved." (JA II., p. 603). As a result, Sterritt received the "passport" which is Employer's Exhibit 1 (JA III, p. 35) shortly after that meeting.

On September 25, 1973, the Union forwarded a new proposal to Sterritt through the officials of Callanan and Span-Crete (JA II., p. 606) (JA III, p. 41) which was amended by Sterritt (JA II., p. 613). The proposal for retroactive pay was not included in the last proposed agreement forwarded by the Union (JA III., p. 54).

On about November 19 the President of Span-Crete advised Sterritt that he had to sign the latest agreement forwarded by the Union (JA II., p. 615) and, thereupon, Sterritt obtained a higher tariff to offset the higher cost (JA II., p. 616). Although Sterritt signed the agreement and left it with the President of Span-Crete to be forwarded to the Union, it has never been signed by the Union (JA II., pp. 528-29).

Soon after implementing the wage provisions of the agreement which he had signed, Sterritt was advised by Span-Crete that they could not continue to pay the higher tariff (JA II., p. 619). In addition, the Union was putting intolerable pressure on Sterritt

through Span-Crete and Callanan officials to make payments to his employees which he had never agreed to make (JA II., pp. 620-21).

Sterritt conceived the idea of terminating the operation of STI and starting a new operation to avoid the economic effects of the new wages which he put into effect on November 19, 1973. This was, of course, a desperate course of action but it did, finally, receive the approval of Local 294 because the Union and the employees didn't want to see Sterritt go out of business (JA II., pp. 46-47, 263, 340, 570).

The Administrative Law Judge found that the Employer "verbally agreed to pay whatever was negotiated retroactively to the employees employed before August 1, 1973." (JA I., p. 26, 11. 2-4) and that it sought to avoid "the terms of the agreement it entered into with the Union . . ." and that "retroactive pay [was] negotiated . . . by the Union . . ." (JA I., p. 32, 11. 42-46, p. 34, 11. 1-6). We submit that the record shows only that such retroactive pay was proposed and, at best, the subject of tentative agreement conditioned on a final, complete agreement which was never finalized by the Union.

Sterritt did sign an agreement in November 1973 and then put higher wages into effect. However, as late as January 9, 1974, the Employer's representative was advised by the Union that "It's being typed for errors and corrections." (JA II., p.529).

Retroactive pay was discussed at the negotiating session on August 30, 1973 (JA II., p. 525). This was in the context of Employer's proposals with respect to waiting time and the slinging of loads (JA II., pp. 526-27). The "tentative" agreements reached at that meeting and the meeting of September 13, 1973 (JA II, p. 525) were turned down by the Union members (JA II., p. 261) on September 14, 1973. Thereafter, the Union included retroactive pay in a written proposed agreement (JA II, p. 613, JA III, p. 41), Employer deleted that proposal and the Union agreed to the deletion by not including it in a subsequent proposed agreement (JA II., pp. 613-614, JA III., p. 54).

In the final "shake down" (the terms are used in both senses), retroactive pay was not a part of any agreement. Employer was compelled to make payments of retroactive pay and other money because

> the Union kept telling the employees that they were going to receive a retroactive payment in the amount of $160 from Sterritt and that they would receive backpay for the 2-1/2 days that Dallas-Mavis performed their work. (JA I., p. 26, 11. 31-35).

In finding the Employer guilty of section 8(a)(1) and 8(a)(3) violations, the Administrative Law Judge identifies the employees' union activity as the acceptance of retroactive pay allegedly negotiated by the Union (JA I., p. 34, 11. 1-6), conspicuously avoiding reference to the so-called "lock out" money

which became an issue when another trucking company hauled for Span-Crete on September 17-19, 1973. There is absolutely no indication that Sterritt ever agreed to pay for those days on which no work was performed. The checks issued (JA III., pp. 25-28) were "blood money" (JA II, p. 274) forced upon the Employer by the Union's putting on pressure through Span-Crete and Callanan.

ARGUMENT

SUMMARY STATEMENT

Section 10(e) of the Act provides that "The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive." The Employer seeks to pierce that formidable barrier.

The Employer succeeded in avoiding the terms of a financially impossible Union agreement -- one which it had implemented but was never accepted by the Union. The Union obviously acceded to those efforts. The Judge commented that

> While it might well be argued that this is something less than the type of representation the men might expect from this strong labor organization it does not constitute an acquiesence or agreement by the Union that the seniority list should not include the Charging Parties (JA I., p. 36, 11. 24-27).

He also finds that

> Even if the Union had "sold out" the employees, Respondent's action in refusing to permit them to work is no less violative. (JA I., p. 36, 11. 30-31).

We submit that there is no evidence to support those conclusions and that they constitute an absolute, per se, rule that a Union may not make any contractual concessions to a financially troubled employer in the face of any employee dissent.

The charging parties were laid off for lack of work and there is no finding that the lay-offs were discriminatory although that is charged in the Complaint. The basic issue in this case is whether the Employer had an affirmative duty to offer recall or reemployment in the absence of any such request -- even to the date of the hearing. It is clear that the charging parties did not accede, as did the Union, to the new pay rates and conditions. We submit that their complete failure to request recall is not protected activity under Section 7 of the Act.

The charging party Frank Ruhnke executed an affidavit on February 21, 1974 and it appears at JA III., p. 36. The change in that affidavit which appears at JA III., p. 38, was made on May 22, 1974, about 10 days before the opening of the hearing and it was made in the presence of and because of questioning by the Attorney who tried the case for the Board. His explanation and description of the change appear at JA II., pp. 497. We submit to the Court that this incident and the patent perjury throughout Ruhnke's testimony (JA II., p. 463 to 508) taint General Counsel's case and the Judge's decision which chooses to ignore the incident and the perjury. The change strikes the substantial admission that Ruhnke knew about Sterritt's plan to set up a new corporation. We submit that all the charging parties had to know of that plan before its

implementation and that their posture of silence is not protected activity.

We submit that the decision of the Administrative Law Judge which was affirmed, pro forma, by the Board is not supported by substantial evidence in the record.

I. THERE IS NO SUBSTANTIAL EVIDENCE ON THE RECORD CONSIDERED AS A WHOLE TO SUPPORT THE JURISDICTIONAL ALLEGATIONS OF THE COMPLAINT ISSUED BY THE NLRB GENERAL COUNSEL IN THIS CASE.

Paragraphs II(e) and (f) of the complaint allege that the Employers business falls within the "instrumentalities, links and channels of interstate commerce" jurisdictional yardstick of the NLRB. General Counsel acknowledged that fact in support of his request for the production of records showing the gross revenue of Sterritt Trucking, Inc. (JA II., p. 301). As the Administrative Law Judge pointed out (JA II., p. 306), General Counsel made it clear that he wanted to show that Sterritt Truacking, Inc. was engaged in interstate commerce directly and the Administrative Law Judge advised him that

> I'm going to give you until after lunch to decide whether you're going to make that motion, which route you want to follow, because I would call to your attention a recent Circuit Court case except that I can't recall the citation or name, where the Court says, wait a minute, you can't go both ways. So, you've got to fish or cut bait, apparently and you'd better decide which way you're going to go before you make your motion (JA II., p. 307).

Upon resumption of the hearing, General Counsel offered a stipulation found to be irrelevant and then abandoned the entire matter of jurisdiction (JA II., p. 308).

We submit that General Counsel's case is fatally defective in that he has failed to prove the allegations of paragraphs II (e) and (f) of the complaint which relate to Span-Crete Northeast.

Neither James K. Sterritt nor Sterritt Trucking, Inc. is a respondent in these proceedings. The Employer's answer (JA I., p. 14) raised the jurisdictional issue by taking the position that neither named respondent did business with Span-Crete Northeast as alleged in the complaint. That issue might have been met in a timely fashion by adding respondents -- even by motion. Rather, General Counsel chose to ignore this vital discrepancy between the complaint and the proof.

In an effort to rescue the NLRB's case on the issue of jurisdiction, the Administrative Law Judge made the following findings:

> (a) "In the year prior to January 31, 1974, JKS performed transportation services valued in excess of $50,000 for Span-Crete Northeast . . . ." JA I., p. 23, 11 44-46).
>
> (b) "The services furnished by JKS are furnished pursuant to the authority held by STI which has no employees and itself performs no operations." (JA I., p. 24, 11. 1-3).

(c) "I find that JKS, STI and CHI are all together a single employer within the meaning of the Act and that CHI is the alter ego of JKS." (JA I., p. 24, 11. 13-16).

(d) "Respondent is and at all times relevant hereto has been an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act." (JA I., p. 24, 11. 21-23).

(e) ". . . Respondent James K. Sterritt has had contractual relations with Span-Crete Northeast and other enterprises engaged in the construction and sale of prestressed concrete building materials pursuant to which Sterritt's enterprises shipped the products of Span-Crete and others within the State of New York and to states other than the State of New York.1/ The operating authority required by state and Federal law reside in STI which apparently at this time exists only for the purpose of holding the operating authority and operated through the other corporations." (JA I., p. 24, 11. 34-39 and p. 4, 11. 1-3).

(f) "The record reveals that the Sterritt enterprises carried a substantial portion of its business to states other than the State of New York." (JA I., p. 24, fn. 1).

The Administrative Law Judge glosses over the failure of proof on the jurisdiction issue by finding that "James K. Sterritt has had contractual relationships with Span-Crete Northeast . . ." ((e) above) and by referring to "Sterritt's enterprises" ((e) above) and "Sterritt enterprises" ((f) above) and by finding that JKS, STI and CHI are all together a single employer. . ." ((c) above).* We submit that there is no indication in the record that James K. Sterritt

* JKS and CHI are the Employer: James K. Sterritt, Inc. and Concrete Haulers, Inc. STI is Sterritt Trucking, Inc.

personally did any business and the finding that STI is an "employer" in this proceeding, without any appearance on his behalf, is procedurally defective and poor policy. The jurisdictional standard requires the showing of a direct link to interstate commerce. The fact is that only STI performed transportation services (JA II., p.151) and that it is not a party to the proceeding.

The finding that "Sterritt enterprises carried a substantial portion of its business to states other than the State of New York" ((f) above) is a completely gratuitous conclusion. There is cimply no such evidence in the record (See JA II. pp. 63 and 148). We submit that this finding is a further effort to gloss over the failure of General Counsel's proof on the issue of jurisdiction.

II. THERE IS NO SUBSTANTIAL EVIDENCE ON THE RECORD CONSIDERED AS A WHOLE TO SUPPORT THE FINDING THAT THE EMPLOYER'S STATEMENTS TO EMPLOYEE ROBERT QUICK VIOLATED SECTION 8(a)(1) OF THE ACT AS ALLEGED IN PARAGRAPHS VI AND X OF THE COMPLAINT AND CONSTITUTE AN INTERFERENCE WITH ITS EMPLOYEES IN THE EXERCISE OF THEIR RIGHTS UNDER SECTION 7 OF THE ACT.

Paragraphs VI (a) and (b) of the complaint allege that Sterritt made threats in violation of section 8(a)(1) of the Act to employees Overbaugh and Quick (JA II., pp. 8 and 9). The Administrative Law Judge recommended dismissal of the Complaint with respect to Overbaugh and Employer took exception to his

finding that Sterritt's statements to Quick violated section 8(a)(1). JA I. p. 35, 11. 37-48 and p. 36, 11. 1-3).

Robert Quick's testimony with respect to conversations with Sterritt "on or about early December, 1973" is at JA II., pages 232 through 237 and there is nothing remotely resembling a threat related in that testimony. Sterritt issued checks at the insistence of the President of Span-Crete who, under Union pressure, threatened to shut down and not pay Sterritt (JA II., pp. 619-21, 642-43). The employees had to be aware that Sterritt was being forced wrongly to issue the checks. Quick refers to "a big hassel going back and forth for two months" (JA II., p. 271) and states that "At that time, there was still a doubt as to who had to pay the money, who was lying" (JA II, p. 273.

The alleged threat set forth in paragraph 6(b) of the Complaint is described by Quick at JA II., page 240. That telephone conversation in mid-January first dealt with Quick's failure to make a timely call for a dispatch and is then described by Quick in these words: "So, then we went on about, you know, some talk about different things." (JA II, p. 240). Then, from those "different things" he selected, "You sure put a lot of people out of work this time." and "You and your Union activities" (JA II., p. 240). We submit that even if such words were used, they do not constitute a "threat" that other employees would lose their jobs.

Quick was the shop steward, first on the seniority list (JA II., p. 241) who, in the same telephone conversation, indicated to Sterritt that he should have been given the job as terminal manager (JA II., p. 256-57). He also quotes Sterritt as saying "You should have gotten Mausoff in the Union. He'd have been a good man on your side." (JA II., p. 258). Like "eloquence," a threat exists in the "man, the subject and the occasion." We submit that there was no threat given or received in the conversation, even as described by Quick.

III. THERE IS NO SUBSTANTIAL EVIDENCE ON THE RECORD CONSIDERED AS A WHOLE TO SUPPORT THE FINDINGS THAT EMPLOYER FAILED AND REFUSED TO RECALL ITS EMPLOYEES WHO ARE THE CHARGING PARTIES IN THESE PROCEEDINGS, THAT SUCH ALLEGED FAILURE AND REFUSAL WAS BASED ON THE EMPLOYEES' HAVING JOINED OR ASSISTED TEAMSTER LOCAL UNION NO. 294 OR ENGAGED IN OTHER UNION ACTIVITIES OR CONCERTED ACTIVITIES FOR THE PURPOSE OF COLLECTIVE BARGAINING OR THEIR MUTUAL AID AND PROTECTION AS ALLEGED IN PARAGRAPHS IX AND XI OF THE COMPLAINT.

The Complaint alleges that the employment terminations (layoffs) were violative of section 8(a)(3) but there is no finding to that effect. The original charges were limited to those terminations and the "failure to recall" was included in the amended charges. This brings us to the heart of the matter. In all of the circumstances of this case, did Sterritt have any affirmative obligation

to "recall" or "reemploy" former employees in the absence of any request or demand for reemployment.

The charges in these proceedings were filed in February 1974. Sterritt with N. Robilotto in early March 1974 and, at Robilotto's request, prepared lists of names of employees and former employees (JA III., p. 17) for Robilotto's use at the March 9, 1974 Union meeting. The General Counsel refers to that list and the March 9th meeting as "incidents leading up to what is contended to be a refusal to recall-to rehire. . ." (emphasis added) (JA II., p. 45). Yet, the charge alleged the refusal to recall or rehire started at the time of the lay-offs. General Counsel also stated that it would be established that "Local 294's attempts to have Mr. Sterritt reinstate these seven men to their former seniority positions were rejected by Mr. Sterritt. . ." (JA II., pp. 12-13). Nothing of the sort was established. Sterritt agreed to reestablish his old seniority list in his meeting with N. Robilotto in early March 1974 (JA II., p. 631). After the March 9th meeting, Sterritt was faced with an impossible situation and he chose to "sit it out" with the majority of the men (JA II., pp. 637-38). It now appears that Robilotto did not continue to pressure Sterritt on this matter because he thought the men who brought the charges failed to live up to a promise to withdraw them (JA II., pp. 286-88).

This raises a serious issue. Why wasn't N. Robilotto, the Union President, called as a witness? His son (testimony at JA II., pp. 22-51) obviously was not a principal participant in the Sterritt-Local 294 scenario. There is not even an explanation in the record for the absence of N. Robilotto.

The charging parties thought that Local 294 and Sterritt were both making fools of them (JA II., pp. 486-87). They faulted Sterritt for locking the door (JA II., pp. 487) on them and he can hardly be blamed for that in the circumstances. He was faced with two hostile groups of employees -- one group having already filed NLRB charges and the other ready to strike. Yet, at no time did any of the charging parties request reemployment. Again, we submit that Sterritt had no affirmative obligation to reemploy.

Sterritt opened up the new operation with this approach:

> I never called anyone. Anyone that is working for Concrete Haulers is someone that has walked in the door and asked for an application, or walked in the door and indicated that he was available for part-time work. (JA II., p. 139).

Obviously, Sterritt was on a treacherous and desperate course in attempting to get out from under the Union contract. He had had no direct contact with the Union since the September 16, 1973 meeting with Robilotto at Marcelle's office (JA II., p. 595).

The Union recognized the need to give Sterritt relief from the terms imposed in November 1973 (JA II., pp. 46-47). It is also clear that Local 294 consented to the changeover effected by Sterritt:

> Prior to that, Nick Robilotto told six men, when he asked them about the successor clause and their back pay, that they weren't going to get any back pay because Concrete Haulers was a completely new organization and Sterritt could hire anybody he wanted for it. (JA II, p. 570).

Also, see testimony at JA II, pages 263 and 340.

Robert Quick raised the successor clause issue with the Union before the lay-off (JA II., p. 405). We submit that the record is clear that all of the charging parties knew, at least by the middle of January 1974, that Sterritt had plans to open another operation with a less expensive labor cost. The charging parties did not approve of that approach and wanted to maintain prior rates and conditions (JA II., pp. 264-65, 336, 403-05). Their position resulted in a "falling out" with the Union (JA II., p. 280). From all of the evidence, it is clear that the charging parties did not apply for reinstatement because they did not agree with the change that had taken place.

This situation can be described in another manner. Sterritt's passive approach was, in effect, an offer of reemployment conditioned

on acceptance of "lesser" wages and conditions approved by the Union. It is now clear that the charging parties wanted no part of such an arrangement. Is their refusal to "go along" by applying for a job with the new Concrete Haulers, Inc. to be considered activity on behalf of a Union which would support an 8(a)(3) complaint? If so, no Union would ever be able to grant relief from an impossible agreement. And here there never was any final agreement -- just the imposition of terms on Sterritt by the Union through officials of Span-Crete and Callanan.

The Union had an ironclad 8(a)(5) case against Sterritt if it chose not to consent to the relief sought and obtained by Sterritt. Obviously, the charging parties would have applauded an 8(a)(5) charges. However, its absence should not give rise to an 8(a)(3) based on their refusal to apply for jobs. This is especially true in view of Sterritt's agreement with the Union to reestablish the old seniority list.

Concluding, we submit that the Employer had no affirmative duty to offer reemployment to former employees who clearly opposed the change of operation and made no effort to request recall or reemployment.

IV. THERE IS NO SUBSTANTIAL EVIDENCE ON THE RECORD CONSIDERED AS A WHOLE TO SUPPORT THE FINDING THAT THE EMPLOYER'S ACTIVITIES IN SEPTEMBER 1973 AND JANUARY 1974 IN DEALING DIRECTLY WITH ITS EMPLOYEES CONSTITUTE ENCOURAGEMENT OF SUCH EMPLOYEES TO BY-PASS TEAMSTER LOCAL UNION NO. 294 OR TO DEAL DIRECTLY WITH EMPLOYEES SO AS TO CONSTITUTE AN UNFAIR LABOR PRACTICE UNDER SECTION 8(a)(1) OF THE ACT.

Sterritt testified that Rippinger "literally kept bugging me" (JA II., p. 629) about a company union and that his reaction was that the idea was "foolish." That and his other testimony regarding that September 1973 meeting is at pages JA II., pp. 629-30). We submit that Sterritt needed the Union and the idea of his instigating a company union is ludicrous. He was then in active negotiations with the Union (JA II., pp. 518-26).

Sterritt did discuss new employment conditions with CHI employees. This has to be viewed in relation to the fact that Sterritt was setting up a different operation for the purpose of "getting out from under" the terms which the Union had imposed on him. At that time he knew that the Union would not oppose that move (JA II., pp. 624, 626). He testified that "we would still have to get some kind of an agreement with the local and which I was in favor of . . ." (JA II., p. 624). The fact that he readily met with Robilotto in early March 1974 also demonstrates

that he had no basic intent to subvert the representation status of the Union. The fact that the Union did not retaliate or even bring NLRB charges demonstrates that it did not consider itself by-passed or undermined.

From July to September, Respondents' representatives took the initiative in the negotiations as detailed in testimony of James Bevier (JA II., pp. 516-28). That testimony is completely ignored in the decision of the Administrative Law Judge.

CONCLUSION

Based on the foregoing, the Employer seeks an Order of this Court setting aside in whole the Order of the NLRB.

Respectfully submitted,

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May 20, 1975.